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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN TIEGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment entered in this case on June 14, 1956, by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 20a–23a) is not reported. The opinion of the Court of Appeals (App. A, *infra*, pp. 16–29) is reported at 234 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956 (App. A, *infra*, p. 30). By order of Mr. Justice Burton, dated August 30, 1956, the time for filing a petition for a writ of certiorari was extended to and including September 28, 1956 (App. B,

infra, p. 31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Title I of the National Housing Act authorizes the Federal Housing Administrator to guarantee the repayment of loans made by approved lending institutions to homeowners for home improvements. Respondent, a real estate dealer, filed with an authorized lending institution, on behalf of certain of his customers, FHA loan credit applications falsely representing that the loans would be used for home improvements; in fact, they were intended to be used and were used for down payments on homes which respondent sold to his customers. The lending institution made the loans and, pursuant to its contract with FHA, obtained FHA insurance on them.

The question presented is whether respondent, in fraudulently causing the lending institution to obtain FHA insurance of the loans, "cause[d] to be presented for payment or approval * * * any claim upon or against the * * * United States" within the False Claims Act, and is therefore liable to the United States for the $2,000 liquidated damages provided in the Act for each such fraudulent claim.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) and of the National Housing Act (48 Stat. 1246, as amended, 12 U. S. C. 1701 *et seq.*), and regulations issued pursuant thereto, are set forth in Appendix C, *infra*, pp. 32–39.

STATEMENT

Title I of the National Housing Act (12 U. S. C. 1701, *et seq.*, App. C, *infra*, pp. 36–39) authorizes the Federal Housing Administrator to insure, upon such terms and conditions as he might prescribe, qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements on real property. The FHA enters into contracts with the lending institutions undertaking to indemnify them against losses on loans reported for insurance to the FHA up to an aggregate amount equal to ten per cent of the total value of such loans. A borrower, who wishes to obtain home improvement loans under that program, applies to the lending institution on an FHA form ("FHA Title I Credit Application (Property Improvement Loan)"). Responsibility for determining that the borrower is a reasonable credit risk rests with the lending institution, which is permitted to rely on statements of fact made by the borrower.

Within 31 days after the loan is made, the lender reports the details of the loan transaction to the FHA on an FHA form provided for the purpose, and certifies that the requirements have been complied with. After the loan is made and the transaction has been reported to it, the FHA computes the insurance premium to be paid by the lending institution, records the transaction on its official records, and acknowledges the loan for insurance. See FHA regulations set forth in App. C, *infra*, pp. 33–36; and *United States* v. *Emory*, 314 U. S. 423, 430, 433.

In this case, the United States sought to recover liquidated damages under the False Claims Act (App. C, *infra,* p. 32) for seven false claims made, either by respondent or at his instigation, for the purpose of obtaining seven FHA-insured loans for home improvements pursuant to Title I. The complaint alleged that respondent, a real estate dealer, on seven occasions between October 1947 and January 1948, had filed with an FHA-approved lending institution, on behalf of certain of his customers, FHA loan credit applications falsely representing that the loans sought would be used to finance improvements on property already owned by the customers when in fact it was intended to use the loans in each case as down payments on property to be sold by respondent to the customer[1] (R. 3a–19a). Relying on respondent's misrepresentations, the lender made the loans (R. 3a–19a). Thereafter, as provided in its contract with the FHA, the lending institution requested and obtained insurance coverage from the FHA pursuant to Title I of the National Housing Act. Prior to the commencement of this action, the Government had been required to make up to the lender his losses on two of the loans on which the borrower had de-

[1] Prior to this action, respondent had been convicted in the District Court for the District of New Jersey on seven counts of violating the criminal provisions of 12 U. S. C. 1731 (a). The provisions of the present complaint followed closely the allegations of the indictment returned against respondent prior to the conviction.

In addition to misrepresenting the purpose for which the loan proceeds were to be used, the complaint also alleged various other misrepresentations as to the customer's financial standing and the incumbrances on, and title to, the property (R. 3a–19a).

faulted; the remaining five loans, however, had been repaid in full (R. 22a–23a).[2]

Respondent moved to dismiss the complaint for failure to state a claim on which relief could be granted (R. 20a). The District Court granted the motion with respect to the first five counts of the complaint relating to the loans which had been repaid in full (R. 23a–24a). On the Government's appeal of this dismissal,[3] the Court of Appeals for the Third Circuit affirmed, holding that no demand had been made on the Government with respect to these loans since each had been paid and that consequently no claim had been presented to the Government within the purview of the False Claims Act (App. A, *infra*, pp. 16–22). Chief Judge Biggs dissented (App. A, *infra*, pp. 22–29).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Third Circuit in this case, together with the Court of Appeals for the Fifth Circuit in *United States* v. *Cochran*, in which a petition for a writ of certiorari is being filed concurrently,[4] have sharply limited the scope of the False Claims Act by denying to the Government the only

---

[2] In addition to liquidated damages, the complaint sought double the Government's actual loss in two counts relating to the loans in default (R. 16a, 19a).

[3] In its order dismissing these counts, the District Court stated that there was no just reason for delay in entering final judgment as to the counts. See Rule 54 (b), Federal Rules of Civil Procedure.

[4] In the *Cochran* case, the facts of which are substantially the same as here, the Court of Appeals for the Fifth Circuit (Judge Rives dissenting) followed the Third Circuit and held that the

fully compensatory remedy available to it against persons who falsely claim and obtain for their own use the credit of the United States. In this case, the Third Circuit held that such a fraudulent claim for the use of Government credit is outside the Act since "claim against the United States", as used in the Act, is restricted to the "conventional meaning of demand for money or property" (App. A, *infra*, p. 21). And in *Cochran*, the Fifth Circuit, following the Third Circuit's ruling here, adopts this restrictive result on the ground that the Act must be viewed "as ordinary penalty statutes are viewed" (C. App., p. 9[5]).

The restrictive approach to the False Claims Act thus adopted by both Courts of Appeals has long since been rejected by this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, reversing 127 F. 2d 233 (C. A. 3), and *Ostrager* v. *New Orleans Chapter*, 317 U. S. 563, reversing 127 F. 2d 649 (C. A. 5). In *Marcus* v. *Hess*, as here, the Third Circuit, construing the Act "with utmost strictness" (127 F. 2d at 235), ruled that although "claim" has several legal meanings (127 F. 2d at 236) "[a] claim against the United States [in the context of the False Claims Act] means 'a right to demand money from the United States' " (127 F. 2d at 237); based on this rationale, the Third Circuit had concluded that vouchers submitted to municipalities pursuant to collusive bids on PWA contracts, part of the cost of which was

Government could not recover for a false claim for the use of its credit.

[5] References "C. App." are to the appendix to the *Cochran* petition.

borne by the Government, were beyond the reach of the Act. Similarly, in *Ostrager,* the Fifth Circuit on virtually identical facts had held that the False Claims Act "must be strictly construed" and that "A claim against the United States could not be made by the contractor, for he had no contract with the government and he had no right to demand money from it" (127 F. 2d 651). In reversing these judgments, this Court not only expressly rejected "the interpretive approach" of the Third and Fifth Circuits (317 U. S. 537, 541; 317 U. S. 563), but held also that the Act provides a civil remedial action, not a penalty (317 U. S. at 548), and pointed out that the Act was to be given "the fair meaning of its intendment," which it found was "to provide protection against those who would 'cheat the United States'" (317 U. S. at 542, 544).

It was only by disregarding *Marcus* v. *Hess* and reverting to their restrictive approach already rejected by this Court that the Third Circuit here and Fifth Circuit in *Cochran* could have held that the United States was not "cheated" when it was induced by the respondents' fraudulent claims of eligibility into extending the benefits of its credit. For, adherence to the principles of *Marcus* v. *Hess* compels the conclusion, as Judge Rives put it in *Cochran,* that "Inducing the Government to pledge its credit by a false and fraudulent claim therefor seems to me as much within the False Claims Act as so inducing it to part with its money or property" (C. App. 12).

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2. (*a*) The allegations of the complaint admitted by respondent for the purpose of his motion to dismiss leave little doubt that respondent "presented or caused to be presented" a claim within the meaning of the Act. According to the complaint, in applying to an FHA-approved lending institution, respondent deliberately misrepresented his customers' eligibility for Government-insured loans as well as the purpose for which the loans were to be used (R. 3a–19a). As a direct result, the lending institution sought and obtained the Government's guarantee that the loans would be repaid in full. Thus, respondent's fraudulent misrepresentations "caused" the lender "to present to the Government" for "approval" false claims that the loans they sought were entitled to FHA insurance. As Chief Judge Biggs noted in his dissenting opinion (App. A., *infra,* pp. 26, 27):

> When Tieger caused the Witalis application to be presented to the Mortgage Company, he set into motion the machinery whereby the loan made to Witalis could be insured by the credit of the United States. When the loan was made by the Mortgage Company and the mortgage was given to that company, the credit of the United States became pledged by way of security against loss on the loan in the manner provided by the statute. * * *
>
> * * * * *
>
> Tieger caused to be "presented" for "approval" a claim for the credit of the United States and obtained the "approval" for "payment" if payment became necessary, of "such [a] claim" by the use of a "false claim" for

credit. Tieger caused to be presented for approval to the Mortgage Company a "claim" for insurance.

In addition, even assuming *arguendo* that the applicable test is whether the claim is for property of the United States, that test is satisfied here. The claim was for the credit of the United States, and since it is the Government's credit which enables it to borrow not only vast amounts of money, but at comparatively low interest rates, it is apparent that that credit is an extremely valuable asset of the Government, as it is of most business enterprises, many of which would not survive if their credit were curtailed. Moreover, the United States, like any private guarantor, has as substantial a property interest in controlling the availability of its credit as in controlling the use of its lands or chattels.

Not only is the Government's credit a valuable asset to it but respondent benefited substantially from its use and probably was unjustly enriched (cf. *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 153, n. 6), since it is improbable the lenders would have made the loans requested, on the terms that they did, absent the backing of the Government's credit. In any case, the undisputable fact is that the assurance of repayment such as that provided by the FHA under Title I has long been accepted as valuable commercial property. *Hare & Chase* v. *National Surety Co.*, 49 F. 2d 447 (S. D. N. Y.); *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95 (C. A. 2); *People* v. *Rose*, 174 Ill. 310; *People* v. *Mercantile Credit Guarantee Co.*, 166 N. Y. 416; *Shakman* v. *United States Credit Sys-*

tem Co., 92 Wisc. 366; Vance, *Insurance*, § 280, pp. 929–932 (2d Ed.). Conservatively estimated, millions of dollars are paid every year by business and industry to obtain the assurance of repayment which the lending institution here was able to obtain from the FHA because of respondent's misrepresentations. See, in general, 9 Appleman, *Insurance Law & Practice*, Sections 5241–5252. Thus, in holding that the fraudulent obtaining of the use of Government credit is not within the False Claims Act, the courts below refused to recognize the part played by credit in the modern business world, and as a result gave the Act an unjustifiably narrow reading.

(*b*) Implicit in the conclusion below is the premise that no claim could be made against the United States within the False Claims Act until the FHA had been required to pay out the money to the lender as a result of respondent's false representation—that is, until the borrower had defaulted and the Government by making good in its guarantee has suffered an out-of-pocket loss. Here again, however, the approach is unrealistic, for where, as in *Cochran*, the borrower is also the defrauder, judgment recovered against him under the False Claims Act would typically be uncollectible and the Act's remedy consequently ineffective.

More important, the premise overlooks the critical fact that once the FHA insurance is obtained, the Government's credit is irrevocably committed so that when the borrower defaults, payment by the Government is required, not because of a new obligation arising at that time, but because of the undertaking

originally assumed as a result of the false representations. Consequently, the fraud is fully consummated when the Government credit is committed to guarantee the loan and the sole effect of a subsequent default by the borrower is to give rise to specific ascertainable damages.

In addition, specific damages are not a condition to the applicability of the False Claims Act; all that is required is that the fraud cause injury to the Government. *Rex Trailer Co.* v. *United States,* 350 U. S. at 152–153 and n. 5. Here, respondent's frauds caused the Government to incur the expense of investigating and prosecuting the frauds (cf. *Rex Trailer, Inc.* v. *United States, supra* at 153, 154), and substantially injured the Government's property interest in the proper use of its credit (cf. *United States* v. *Weaver,* 207 F. 2d 796, 798 (C. A. 5)). Under the National Housing Act, the FHA is authorized to insure repayment of only 10 per cent of the total value of the otherwise eligible loans made by a lending institution. Hence, respondents' fraudulent loan applications resulted in a decrease in the amount of insured loans that could be made to eligible borrowers, thus directly frustrating the purposes of the Act. In *Rex Trailer Co.* v. *United States, supra,* this Court, stressing that the fraudulent purchases of Government surplus vehicles "precluded bona fide sales to veterans" concluded that "it is obvious that injury to the Government resulted from * * * the fraudulent purchase of trucks * * *. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a

measure of recovery in such circumstances" (350 U. S. at 153–154).

Plainly, therefore, a false claim to the use of the Government's credit is, without more, a "claim" within the False Claims Act, an Act which in broadest possible terms applies to any knowingly false "claim upon or against the Government," and which was intended to provide to the Government "protection against those who would cheat [it]."

(*c*) To support its restriceitve reading of "claim upon or against the Government", the Third Circuit relied heavily upon language in *United States* v. *Cohn*, 270 U. S. 339, at 345 (App. A, *infra*, pp. 21–22). But the *Cohn* decision held only that the False Claims Act was inapplicable to misstatements by which defendants obtained possession of nondutiable merchandise from customs officials. The Court there pointed out that the false application sought "entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government, makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession" (270 U. S. at 346).

In so holding, the Court stated in *dictum* (*id.* at 345) that the Act extends "solely to the payment or approval of a claim for money or property to which a right is asserted against the Government * * *." We have shown (*supra*, pp. 8–10) that respondents in these cases did make, or cause the making of, a claim against the United States for its credit, a highly valuable intangible asset of the Government. Further-

more, *Cohn* was distinguished in *Marcus* v. *Hess, supra,* 317 U. S. at 545, and is at most of limited applicability here, since the specific language involved in that case, although in part paralleling the civil remedy provision of the False Claims Act, was contained in a criminal provision since substantially revised. See *United States* v. *Rohleder,* 157 F. 2d 126, 128–129 (C. A. 3). In any case, since in *Cohn* no claim whatever against the Government was involved, let alone one for its intangible property, this Court there had no occasion to consider whether a claim for intangible property is within the Act's coverage, and consequently the general statement addressed to a different issue is clearly not controlling. As Chief Judge Biggs stated: "the ruling in the *Cohn* case [is not] controlling here for the question presented here was not in focus therein" (App. A, *infra,* p. 28, fn. 13).

3. The issues presented by these cases are of far-reaching importance. The False Claims Act is the only statute of general applicability providing a civil remedy against persons seeking to cheat the Government in regard to its financial interests. In addition to this case and *Cochran,* this issue under Title I of the National Housing Act is involved in *United States* v. *McNinch,* C. A. 4, No. 7224, and approximately 930 other cases, many involving multiple claims, now pending before the District Courts in the eleven judicial circuits. Over 380 of these cases concern claims as to which there has been no default. In each of the remaining cases, there has been a default, with an indeterminate number also including one or more claims as to which there has been no default.

Since the early 1930's, moreover, Government loan guarantee programs have come to play an increasingly larger part in the Government's financial relations with its citizens, eclipsing such governmental activities as civil procurement, land transactions, and property disposal.[6] Since access to the Government's credit is of great value to many persons, these programs open a fertile field to those seeking to defraud the Government by misrepresenting their eligibility for the benefits of Government loan guarantees. The decision in this case, therefore, has implications far beyond the FHA guarantee program, and may well

[6] Government loan guarantee programs make up a substantial part of the Government's financial dealings with its citizens, if tax collection, which is subject to separate civil fraud remedies, is excluded. By contrast, sale of surplus property, the activity involved in *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148, constitutes only a small portion of the Government's "business" relations with private persons. The FHA home improvement program is only one of a large number of Government loan guarantee programs, all of which have special eligibility requirements and typically offer advantages over commercial credit terms available to the general public. A by-no-means exhaustive list includes the loan guarantees made by the Export-Import Bank to facilitate exports and imports (12 U. S. C. 635); insurance of housing loans by the Housing and Home Finance Administration (12 U. S. C. 1701g); mortgage insurance by the Federal Housing Administration (12 U. S. C. 1706c, 1707–1709, 1744); loan guarantees to small business by the Small Business Administration (15 U. S. C., Supp. III, 636); loan guarantees to veterans by the Veterans Administration (38 U. S. C. 694, *et seq.*); and defense loan guarantees by Department of Treasury (50 U. S. C. App. 2092 *et seq.*). It is common knowledge that the Government rarely, if ever, enters into the loan guarantee field if commercial credit is available fully to supply the need which would be served by the Government guarantees. Cf. *United States* v. *Emory*, 314 U. S. 423, 433.

determine the applicability of the False Claims Act to virtually every Government guarantee transaction. The liquidated damage provision of the Act is particularly important in the guarantee field, for the Government's remedy after default is usually illusory (see *supra,* p. 10), and the difficulty of proving specific ascertainable damages prior to default in these transactions renders useless ordinary common law actions for deceit or breach of contract. Cf. *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 153.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1956.

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APPENDIX A

In the United States Court of Appeals
for the Third Circuit

No. 11591

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN TIEGER

Appeal from the United States District Court for the District of New Jersey

Argued November 14, 1955

Before BIGGS, *Chief Judge*, and KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed June 14, 1956)

By HASTIE, *Circuit Judge:*

On motion, the district court dismissed for failure to state a cause of action[1] certain counts of a complaint wherein the United States sued defendant Tieger for a statutory civil penalty under the False Claims Act. R. S. §§ 3490, 5438, 31 U. S. C. § 231.

[1] As authorized by Rule 12 (b) (6), Fed. R. Civ. P., 28 U. S. C.

This appeal[2] requires decision whether that which Tieger is alleged to have done is a violation of the False Claims Act.

Tieger is a realtor who, to enable his clients to borrow money needed for down payments on the purchase of property, is alleged to have misrepresented the proposed transactions as improvement loans on structures already owned by the borrowers. Each count is based upon a loan obtained by one of Tieger's clients from a private lending institution and insured routinely by the United States as a property improvement loan, insurable under Title I of the Federal Housing Act.[3]

The essence of the complaint is that the United States was induced to guarantee repayment of the loan, thus changing its legal position detrimentally, by willfully false representations concerning the circumstances of the borrower and the intended use of the money, submitted by Tieger as part of the loan application with the intention that the United States, as well as the lender, should rely upon them. However, in each case, the loan was repaid in full by the borrower so that no claim was made upon the United States as guarantor.

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[2] Judgment was entered on 5 of 7 counts and appeal taken in accordance with Rule 54 (b), Fed. R. Civ. P., 28 U. S. C.

[3] Since 1934, Title I of the National Housing Act, 48 Stat. 1246, 12 U. S. C. 1701 *et seq.* has authorized the Federal Housing Administrator to insure qualified lending institutions against losses on certain types of real property improvement loans. In practice an institution first qualifies with the administrator and receives a general undertaking of the government to make good any losses on a certain category of business up to a stated maximum. When the institution makes a particular loan, it submits all required data on the transaction to the administrator who, if the transaction is in order, then acknowledges it for insurance and makes the appropriate charge against the institution for this protection.

In these circumstances the government contends that Tieger is liable under the following provision of the False Claims Act:

> Any person * * * who shall * * * cause to be presented, for payment or approval, * * * any claim upon or against the * * * United States * * *, knowing such claim to be * * * fraudulent, or who for the purpose of obtaining * * * the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained. * * * 31 U. S. C. § 231.

Only the statutory penalty is claimed, it being admitted that the United States has suffered no loss.[4]

It will be observed that this section covers both the presentation of a fraudulent "claim" against the United States for "payment or approval" and the use of false supporting documents to obtain "the payment or approval of such claim." The latter alternative seems more nearly applicable to the present facts. Accordingly, we will treat this as a case in which the defendant is charged with using a "false * * * certificate" in order "to obtain the payment or approval" of a "claim upon or against the * * * United States."

But whatever combination of words may seem most favorable to the government, the statute can apply to this case only if the government's contractual undertaking to repay a private bank loan if the borrower

[4] This court has recognized that a false claim may be actionable though in the given case the government has not been injured by its assertion. *United States* v. *Rohleder*, 3 Cir. 1946, 157 F. 2d 126.

should default, itself constituted the "payment or approval" of a "claim against the United States." We think this is a fair and accurate statement of the government's legal problem. At the same time it reveals the inherent difficulty and weakness of the position the government has to take. For the conception of a claim against the government normally connotes a demand for money or for some transfer of public property. Believing that connotation applies here, we shall affirm the judgment below simply on the ground that when Congress legislated against fraud in connection with the "payment or approval" of "any claim upon or against the United States" it did not cover fraud in inducing the United States to make a guarantor's promise, performance of which was conditioned upon an event which never occurred. True, the contract Tieger induced might have led to what would undoubtedly be considered a claim against the United States, but it never did.[5] And certainly, there is no indication that Tieger intended or even anticipated any default by the borrower and consequent claim on the guarantor.

Actually, the alleged claim against the United States here is no more than the privilege of the lending bank, in such a case as the loan application falsely represented this to be, to negotiate a unilateral contract under which the bank pays a modest consideration and receives in return the promise of the United States to make good if a borrower shall default. It is possible to view this commercially advantageous privilege of exchanging a little money for such an

[5] Contrast *United States ex rel. Marcus* v. *Hess*, 1943, 317 U. S. 537, where the gravamen of the offense was not merely inducing the United States to enter into a contract pursuant to collusive bidding, but, beyond that, the development of the transaction to the point where the government could be and was confronted with a demand for payment in performance of the contract.

aleatory promise as a claim. But this privilege of contracting certainly is not a claim in normal business or legal usage and terminology. For familiar example, a policy of life insurance often accords the owner during the life of the insured a privilege of converting the policy into a new and different contract. It seems as strange to describe the exercise of this privilege of contracting as a claim, as it is normal so to denominate an application for the sum payable upon the death of the insured.

Both the legislative history [6] and certain language [7]

[6] See the Senate debate, Cong. Globe, 1863, 37th Cong., 3d Sess. 952–8 and the House Report, H. R. Rep. No. 2, 37th Cong., 2d Sess., which preceded the passage of the original Act of March 2, 1863, C. 67, 12 Stat. 696, from which the presently questioned language of the False Claims Act is derived. This legislation during the grimmest days of the Civil War was the aftermath of great scandal in military procurement and a legislative investigation which had confirmed charges of widespread and corrupt profiteering in the acquisition and disposition of supplies and material, including much rather informal transaction of business in and with field commands. The submission of false bills and vouchers to support the payment of money and other transfer of property was a characteristic means of perpetrating such wrongs. So, in drafting remedial legislation Congress used language descriptive of this kind of cheating. For brief discussions of the statutory history, see *United States ex rel. Marcus* v. *Hess*, 3 Cir. 1942, 127 F. 2d 233, 235–6; Note, 1956, 69 Harv. L. Rev. 1106, 1107.

[7] The "claim" must be presented for "payment or approval." This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter into a contract.

The enumeration of false tokens supporting false claims specifies "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition." Here too the types of token are those which normally support a demand for money or property but are unusual where the making of a contract is the transaction in view.

of the False Claims Act point to the soundness of the construction which thus restricts "claim against the United States" to this conventional meaning of demand for money or property. But resort to these is unnecessary because the Supreme Court has so clearly stated its view of the matter.

United States v. *Cohn,* 1926, 270 U. S. 339, was a criminal prosecution in which one of the charges was the violation of the very provision now in suit, which then was effectuated and enforcible by a criminal as well as a civil sanction.[8] Referring to this provision the court explicitly considered whether the conduct of the defendant amounted to "obtaining the approval of a 'claim upon or against' the Government, within the meaning of the statute [False Claims Act]." It then construed the decisive language of the statute, saying: "While the word 'claim' may sometimes be used in the broad juridical sense of 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615, it is clear in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." 270 U. S. at 345–6.

Seeking to minimize the force of this construction the government calls it "dictum", meaning, appar-

[8] The basic language of the False Claims Act and the supporting criminal sanction then in force appeared in Section 35 of the Penal Code, as amended by the Act of October 23, 1918, C. 194, 40 Stat. 1015. The analogous present criminal sanctions appear in 18 U. S. C. §§ 286, 287.

ently, that this construction was more restrictive than the exigencies of the case required. But, to an inferior federal court, such a plain statement of a statute's meaning, adopted by the Supreme Court as the basis of its decision is much more than "dictum", however apparent it may seem to analysts that the court could have gone on a narrower ground, had it chosen to do so.

The district court correctly concluded that the statute deals only with false claims upon the government for money or property and that no such claim is revealed in the counts which have been dismissed.

The judgment will be affirmed.

BIGGS, *Chief Judge,* dissenting:

The defendant, Tieger, a real estate dealer, on seven occasions between October 27, 1947, and January 29, 1948, caused loan credit applications to be presented to the General Union Mortgage Company of Newark, New Jersey. Each application was made on a government form designated as "FHA Title I Credit Application (Property Improvement Loan)." Alleging that Tieger caused credit to be obtained by these applications and that pertinent statements contained in them were false, the United States brought a civil action against him in the court below, basing its complaint upon the provisions of R. S. §§ 3490 and 5438, 31 U. S. C. A. § 231, the False Claims Act. The complaint contains seven counts. Tieger moved to dismiss on the ground that the complaint failed to state a cause of action. The court below granted the motion as to Counts 1 to 5 inclusive but denied it as to Counts 6 and 7, entering final judgment on the first

five counts.[9] Rule 12 (b) (6), FRCP, 28 U. S. C. The United States has appealed. We are concerned here only with the question as to whether the first five counts state a cause of action on which the United States may recover.

For the purposes of the appeal, the allegations contained in these counts must be taken to be true. The The first count is typical. It alleges that General Union Mortgage Company was a New Jersey corporation with offices in Newark, New Jersey, a financial institution qualified and eligible for credit insurance against losses sustained by it as a result of loans and advances of credit and purchases of obligations representing loans and advances of credit for the purpose of financing alterations, repairs, and improvements of existing structures, and was so authorized and empowered by the Federal Housing Administrator; that on or about December 22, 1947, in Newark, Tieger, for the purpose of obtaining from the Mortgage Company a loan and advances of credit in the sum of $1500 for one Witalis and his wife, caused to be presented to the Mortgage Company an application signed by Witalis and his wife containing false statements, known to Tieger to be false, namely, that the loans would be used to make improvements on a certain property owned by Witalis when in fact Witalis did not own that property but intended to, and in fact did, use the loan as a down payment on the property; and that the Mortgage Company issued a check payable to the order of Witalis in the amount of $1500

[9] The court stated that there was no just reason for delay in entering final judgment as to these counts, in accordance with Rule 54 (b), FRCP, 28 U. S. C.

in reliance upon the false statements made in the credit application, receiving as security for the loan a negotiable promissory note of Witalis and his wife payable to the Mortgage Company. The count further alleges that the Mortgage Company negotiated the promissory note to First Bancredit Corporation of St. Paul, Minnesota, and that the Witalis note was submitted to the Federal Housing Administrator by First Bancredit Corporation and accepted by the Administrator for insurance on December 26, 1947, in reliance on a loan report submitted by First Bancredit Corporation. The count demands judgment for the United States against Tieger in the sum of $2,000 because of this "fraudulent claim." It is not alleged that the United States suffered any loss by reason of the false statements in the application. Indeed, the trial court stated in its opinion that "* * * it is conceded that the loans were repaid."

The court below based its judgment in favor of Tieger on its interpretation of the term "claim" as contained in R. S. §§ 3490 and 5438, 31 U. S. C. A. § 231, set out below.[10] The court said: "The term 'claim,'

[10] The statute states: "Any person * * *, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, * * * service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in

in its common acceptance, denotes a demand for money or property as of right" citing, *inter alia*, *Hobbs* v. *McLean*, 117 U. S. 567, 575 (1886), and pointing out that in its view the counts contained no allegation that any "demands" were ever made upon the United States or any of its agencies and that in fact the repayment of the loans precluded such demands. The United States contends that it is not necessary for the government to make an actual payment of money in order to subject a claimant to liability under the False Claims Act and that liability attaches immediately upon the claimant's making an application. The United States also argues that the word "claim" in the statute goes further than a simple demand for the immediate payment of money and encompasses "all conduct seeking the approval by the Government of claims or assertions as of right to action by the Government affecting its money or property, or the adjustment of the claimed right as between the Government and the applicant." [11] Here what was obtained by Witalis and the other applicants aided by Tieger was the pledging of the credit of the United States to insure their loans.[12] There can be no doubt of this as a fact, assuming the allegations of the five counts to be true, as we must on this appeal.

How was the "claim," assuming *arguendo* that it be such, made? Since Count 1 is typical it may be employed for this purpose. Title I of the National

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the same suit." All the counts with which we are concerned claim only the statutuory amount of $2,000.

[11] Appellant's brief, p. 7.

[12] The complaint alleges that the various borrowers in fact used the property improvement loans to make down payments on the properties in question. Tieger's real estate business apparently benefited from additional sales as a result thereof.

Housing Act, 48 Stat. 1246, 12 U. S. C. A. § 1702 sets up the Federal Housing Administration. Section 1703 (a) empowers the Administrator to insure banks, trust companies, mortgage companies and other financial institutions, which the Administrator finds to be qualified and eligible for the purpose of financing alterations, repairs and improvements to existing structures and for the building of new buildings, in amounts not exceeding 10% of the total amount of the loans made by the qualified institutions. Section 1703 (f) provides that the Administrator shall fix a premium charge for the insurance, which charges when paid are to be deposited in an account in the Treasury of the United States. The Mortgage Company in the instant case was an institution qualified for the making of loans as provided by the National Housing Act and was entitled to insurance by the United States as provided by the Act. When Tieger caused the Witalis application to be presented to the Mortgage Company, he set into motion the machinery whereby the loan made to Witalis could be insured by the credit of the United States. When the loan was made by the Mortgage Company and the mortgage was given to that company, the credit of the United States became pledged by way of security against loss on the loan in the manner provided by the statute. See again the provisions of Section 1703. The credit of the United States was thus sought and was thus pledged.

I can find no substance in the District Court's statement that repayment of the loans precluded the existence of any "claim." It is not necessary that the government suffer pecuniary loss. This very term of court an unanimous Supreme Court stated: "The case of *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 [1943], involved a provision of the False

Claims Act, R. S. §§ 5438, 3490, 31 U. S. C. § 231, essentially the equivalent of § 26 (b) (1) [of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U. S. C. A. § 1635, involved in the present case]. * * * It is insisted * * * that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in *Marcus.*" *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 152–153 (1956). See also our own decision in *United States* v. *Rohleder,* 157 F. 2d 126 at p. 129 (3 Cir. 1946).

To come now to the more basic question presented by this appeal: Is a property improvement loan application which is to be insured under the National Housing Act a "claim" against the United States within the meaning of the False Claims Act? The statute was enacted by Congress on March 2, 1863, 12 Stat. 698. Although there have been many subsequent modifications and amendments, these are in fact irrelevant to the issue before us, for the law has remained substantially intact in all relevant particulars up to the present time. Its literal language leads me to the conclusion that Witalis' and Tieger's acts fall within its terms. Tieger caused to be "presented" for "approval" a claim for the credit of the United States and obtained the "approval" for "payment," if payment became necessary, of "such [a] claim" by the use of a "false claim" for credit. Tieger caused to be presented for approval to the Mortgage Company a "claim" for insurance.

The statute is not penal but civil in nature. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 548–552 (1943), Cf. *Rex Trailer Co.* v. *United States,* 350 U. S. 148 (1956), "[W]e must give it the fair meaning of its intendment." *United States ex rel. Marcus*

v. *Hess, supra,* 317 U. S. at p. 542. I do not think that this court, the court below or the appellee have done so. *Hobbs* v. *McClean,* 117 U. S. 567 (1886) and *Milliken* v. *Barrow,* 65 Fed. 888 (C. C. E. D. La. 1895), relied upon by the district court, concern the word "claim" in another statute with a wholly different purpose. Many of the earlier decisions, which considered the statute "highly penal," have been discredited. See the discussion in *United States ex rel. Rodriquez* v. *Weekly Publications,* 68 F. Supp. 767 (S. D. N. Y. 1946). The court's conclusion in that case is borne out by the Supreme Court in *Rex Trailer Co.* v. *United States, supra.* The quotations in appellee's brief apparently limiting the meaning of the word "claim" in the False Claims Act to "a demand for money or property as of right" have been removed from their proper factual context.[13] In each

[13] In *United States* v. *Cohn,* 270 U. S. 339, 346 (1926), the Court said with regard to whether the act committed there had constituted a "claim": "[O]bviously * * * [the word "claim"] does not include an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession." There the defendant had obtained delivery of a shipment of cigars without presenting the bill of lading, thereby attempting to avoid the necessity of paying a sight draft attached to the bill.

I cannot regard the ruling in the *Cohn* case as controlling here for the question presented here was not in focus therein, though the majority of this court feel that there is apt, if not controlling, *dicta* in the opinion.

In *United States ex rel. Kessler* v. *Mercur Corp.,* 13 F. Supp. 742, 743 (S. D. N. Y. 1935), the Court stated, "The action may not be maintained where all that is alleged is that the defend-

instance, the Court was simply promulgating a broad definition which was sufficient to dispose of a factual situation far removed both from the usual type of claim and from the present case. In fact, there is language in *United States* v. *Byron,* 223 Fed. 798 (D. Ore. 1915) a decision cited both by the court below and by appellee, which seems to support the Government's contention, "A claim, within the meaning of this statute, is the demand of something from the United States on the ground of right, as the assertion of a right to the title, possession or ownership of property, or *the affirming of a debt, obligation, or the like* * * *." *Id.* at p. 800. [Emphasis added.] In the case at bar no money was paid, but a claim for the insurance of credit was presented and effected.

Another point remains, namely, the fact that the application was presented to the Mortgage Company rather than directly to the United States. The decision of the Supreme Court in *United States ex rel. Marcus* v. *Hess, supra,* conclusively disposes of this point in favor of the United States.

I would reverse the judgment and, for that reason, dissent.

[Stamped:]

Received and filed June 14, 1956.

IDA O. CRESKOFF, *Clerk.*

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ant has made false statements as to his own property, as in an income tax return." Affirming, 83 F. 2d 178 (2 Cir. 1936), the Second Circuit pointed out that the action involved a claim by the Government against Mercur for property withheld from the Government and not a false claim by Mercur against the Government.

Our own decision in *United States ex rel. Marcus* v. *Hess,* 127 F. 2d 233 (3 Cir. 1942) was, of course, reversed by the Supreme Court, 317 U. S. 537 (1943).

In the United States Court of Appeals for the Third Circuit

No. 11,591

UNITED STATES OF AMERICA, APPELLANT

vs.

MARTIN TIEGER

On Appeal from the United States District Court for the District of New Jersey

Present: BIGGS, *Chief Judge,* and KALODNER and HASTIE, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF, *Clerk.*

JUNE 14, 1956.

[Stamped:]

Received and filed June 14, 1956.

IDA O. CRESKOFF, *Clerk.*

APPENDIX B

In the Supreme Court of the United States

No. ——, October Term, 1956

UNITED STATES OF AMERICA, PETITIONER

vs.

MARTIN TIEGER

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 28, 1956.

/S/ HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of August, 1956.

APPENDIX C

The civil remedy provision of the False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Federal Housing Commission regulations, in effect at the time the loans involved in this proceeding were made, provided in part (Note: for convenience, reference is to the latest CFR supplement, there having been no applicable changes in the regulations):

24 C. F. R.:

SUBCHAPTER B—PROPERTY IMPROVEMENT LOANS

§ 201.1 *Definitions.* As used in the regulations in this part, the term:

* * * * *

(e) "Insured" means a financial institution holding a Contract of Insurance under Title I of the act.

(f) "Loan" means an advance of funds or credit or the purchase of an obligation evidenced by a note.

* * * * *

(i) "Borrower" means one who applies for and receives a loan in reliance upon the provisions of the act and whose interest in the property to be improved is (1) a fee title, or (2) a life estate, or (3) an equitable interest under an instrument of trust or contract, or (4) a lease having a fixed term, expiring not less than six calendar months after the maturity of the loan.

* * * * *

§ 201.5 *Credits and collections*—(a) *Credit application.* Prior to making a loan the insured shall obtain a dated Credit Application executed by the borrower on a form approved by the Commissioner. A separate Credit Application is required for each loan made or note purchased.

(b) *Credit investigation.* The Credit Application, supplemented by such other information as the insured deems necessary, must, in the judgment of the insured, clearly show the borrower to be solvent, with reasonable ability to

pay the obligation and in other respects a reasonable credit risk. If, after the loan is made, an insured who acted in good faith discovers any material misstatements or misuse of the proceeds of the loan by the borrower, dealer, or others, the eligibility of the note for insurance will not be affected. However, the insured shall promptly report such discovery to the Commissioner.

* * * * *

(f) *Security.* The taking of security to secure the payment of a loan is left to the discretion of the insured unless specifically required by the Commissioner in accordance with the provisions of paragraph (e) of this section or of § 201.2 (d) (2) (iii). An insured may permit the substitution or subordination of security provided it can be shown when claim is made that at the time of such action the original security value was not impaired or reduced as a result of such action. Upon presentation of the facts the prior approval of the Commissioner may be obtained by the insured to any proposed substitution or subordination of security.

(g) *Collections.* The insured is required to service loans in accordance with acceptable practices of prudent lending institutions. In the event of default, the insured should have adequate facilities for contacting the borrower and otherwise exercise diligence in collecting the amount due. The insured is responsible to the Commissioner for proper collection efforts even though actual collection may be performed by an agent.

* * * * *

§ 201.6 * * * (b) *Use of proceeds.* The proceeds of a loan shall be used only to finance alterations, repairs, and improvements upon real property or in connection with existing structures which substantially protect or im-

prove the basic livability or utility of the property, and which are commenced in reliance upon the credit facilities afforded by Title I of the act.

(c) *Reliance on Credit Application.* An insured acting in good faith may, in the absence of information to the contrary, rely upon all statements of fact made by the borrower, which are called for by the borrower's Credit Application, in determining the eligibility of the loan.

* * * * *

§ 201.10 *Report of loans.* Loans shall be reported on the prescribed form to the Federal Housing Administration at Washington, D. C., within 31 days from the date of the note or date upon which it was purchased. Any loan refinanced as provided in § 201.9 shall likewise be reported on the prescribed form within 31 days from date of refinancing. In any case, the Commissioner may, in his discretion, accept a late report.

§ 201.11 *Claims*—(a) *Claim application.* Claim for reimbursement for loss on an eligible loan shall be made on a form provided by the Commission, and executed by a duly qualified officer of the insured. The claim shall be accompanied by the insured's complete credit and collection file pertaining to the transaction.

(b) *Claim after default.* Claim may be made after default provided demand has been made upon the debtor for the full unpaid balance of the note.

* * * * *

§ 201.13 *Insurance charge*—(a) *Rate.* The insured shall pay to the Commissioner an insurance charge equal to sixty-five one-hundredths (0.65) of 1 percent per annum of the net proceeds of any eligible loan reported and acknowledged for insurance * * *.

(b) *When payable.* Such insurance charge for the entire term of the loan shall be paid within 25 days after the date the Commissioner

acknowledges receipt to the insured institution of the report of loan * * *.

* * * * *

(d) *Refund or abatement.* There shall be no refund or abatement of any portion or installment of the insurance charge except:

(1) The charge on a refinanced note may be credited with the unearned portion of the charge on the original note;

(2) Insurance charges falling due after claim is filed or the note is prepaid in full;

(3) The charge paid on a loan or portion thereof found to be ineligible.

* * * * *

---

3. Title I of the National Housing Act as amended (48 Stat. 1246; 12 U. S. C. 1701, 1703) provides in part:

INSURANCE OF FINANCIAL INSTITUTIONS

(a) The Commissioner is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions, which the Commissioner finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to September 30, 1956, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban, or rural real property (including the restoration, rehabilitation, rebuilding, and replacement of such improvements which have been damaged

or destroyed by earthquake, conflagration, tornado, hurricane, cyclone, flood, or other catastrophe), by the owners thereof or by lessees of such real property under a lease expiring not less than six months after the maturity of the loan or advance of credit. In no case shall the insurance granted by the Commissioner under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit, and purchases: *Provided,* That with respect to any loan, advance of credit, or purchase made after the effective date of the Housing Act of 1954, the amount of any claim for loss on any such individual loan, advance of credit, or purchase paid by the Commissioner under the provisions of this section to a lending institution shall not exceed 90 per centum of such loss. The aggregate amount of all loans, advances of credit, and obligations purchased, exclusive of financing charges, with respect to which insurance may be heretofore or hereafter granted under this section and outstanding at any one time shall not exceed $1,750,000,000.

After the effective date of the Housing Act of 1954, (i) the Commissioner shall not enter into contracts for insurance pursuant to this section except with lending institutions which are subject to the inspection and supervision of a governmental agency required by law to make periodic examinations of their books and accounts, and which the Commissioner finds to be qualified by experience or facilities to make and service such loans, advances or purchases, and with such other lending institutions which the Commissioner approves as eligible for insurance pursuant to this section on the basis of their credit and their experience or facilities to make and service such loans, advances or

purchases; (ii) only such items as substantially protect or improve the basic livability or utility of properties shall be eligible for financing under this section, and therefore the Commissioner shall from time to time declare ineligible for financing under this section any item, product, alteration, repair, improvement, or class thereof which he determines would not substantially protect or improve the basic livability or utility of such properties, and he may also declare ineligible for financing under this section any item which he determines is especially subject to selling abuses; and (iii) the Commissioner is authorized and directed, by such regulations or procedures as he shall deem advisable, to prevent the use of any financial assistance under this section (1) with respect to new residential structures that have not been completed and occupied for at least six months, or (2) which would, through multiple loans, result in an outstanding aggregate loan balance with respect to the same structure exceeding the dollar amount limitation prescribed in this subsection for the type of loan involved.

(b) No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it (1) if the amount of such loan, advance of credit, or purchase made for the purpose of financing the alteration, repair, or improvement of existing structures exceeds $2,500, or for the purpose of financing the construction of new structures exceeds $3,000; (2) if such obligation has a maturity in excess of three years and thirty-two days, except that such maturity limitation shall not apply if such loan, advance of credit, or purchase is for the purpose of financing the construction of a new structure for use in whole or in part for agricultural purposes; or (3) unless the obligation bears such interest, has such maturity, and contains such other terms, con-

ditions, and restrictions as the Commissioner shall prescribe, in order to make credit available for the purposes of this subchapter: * * *

* * * * *

(f) The Commissioner shall fix a premium charge for the insurance hereafter granted under this section, but in the case of any obligation representing any loan, advance of credit, or purchase, such premium charge shall not exceed an amount equivalent to 1 per centum per annum of the net proceeds of such loan, advance of credit, or purchase, for the term of such obligation, and such premium charge shall be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Commissioner. The moneys derived from such premium charges and all moneys collected by the Commissioner as fees of any kind in connection with the granting of insurance as provided in this section, and all moneys derived from the sale, collection, disposition, or compromise of any evidence of debt, contract, claim, property, or security assigned to or held by the Commissioner as provided in subsection (c) of this section with respect to insurance granted on and after July 1, 1939, shall be deposited in an account in the Treasury of the United States, which account shall be available for defraying the operating expenses of the Federal Housing Administration under this section, and any amounts in such account which are not needed for such purpose may be used for the payment of claims in connection with the insurance granted under this section. * * *

(g) The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Office - Supreme Court, U.S.
FILED
OCT 27 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 463

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN TIEGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS PETITION FOR A WRIT OF CERTIORARI AND RESPONSE TO THE PETITION FOR CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

CROSS PETITION FOR A WRIT OF CERTIORARI AND RESPONSE TO THE PETITION FOR CERTIORARI

Attorney for respondent prays that the Petition for a Writ of Certiorari to review the Judgment entered in this case on June 4th, 1956 by the United States Court of Appeals for the Third Circuit, filed by the Petitioner, United States of America, be denied; and that a Writ of Certiorari issue to the respondent to review the Judgment entered in this case on June 14th, 1956, by the United States Court of Appeals for the Third Circuit to the extent that said Judgment did not dismiss Counts 6 and 7 of the Complaint.

Opinions Below

The opinion of the District Court (R. 20a-23a in appendix of applicant's brief filed in the U. S. Court of Ap-

peals for the Third Circuit No. 11,591) is not reported. The opinion of the Court of Appeals (App. A, *infra*, pp. 16-29) is reported at 234 F. 2d 589.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Counter Statement of the Questions Presented

1. Whether the *defendant* made, filed, presented or in anywise caused *a claim* to be presented for payment or approval to the United States or to any subdivision or officer thereof within the contemplation, intent, and/or purview of the "False Claims Statute."

2. Can a claim within the contemplation, intent, and/or purview of the "False Claims Statute" in anywise be presented or caused to be presented by the defendant, who is a stranger to a contract of indemnity or guarantee such as is the F.H.A. policy of insurance issued in case at bar, and when such defendant is also a stranger to the United States and the other contracting parties to the aforesaid contract of guarantee or indemnity?

Statute and Regulations Involved

The Statute and Regulations involved are adequately set forth in the Petition and Appendix C of the Petition.

Counter Statement of the Case

Since this case involves Judgment of Dismissal of five (5) counts in a seven-count Complaint, it is unnecessary to present a Counter Statement of the case since the Peti-

tion for a Writ of Certiorari can be considered solely upon the allegations of said Complaint. The defendant must necessarily concede the truth of said allegations in the Complaint, since on a General Demurrer to the Complaint, the truth of the said allegations must be conceded for the purpose of the motion.

However, the defendant takes exception to the statements made by the Government in its Petition and particularly, on page 4 commencing on line 16 which reads: "Relying on respondent's misrepresentations, the lender made the loans;" and denies the allegations of the Government that he filed "on behalf of certain of his customers F.H.A. Loan Credit Applications falsely representing that the loans sought would be used to finance improvements on property already owned by customers when in fact it was intended to use the loans in each case as down payments on property to be sold by respondent to the customer."

(I note Counsel for the Government has seen fit to append a statement on page 4, note #1 of his Petition for a Writ of Certiorari. I assume Counsel does not know that the testimony, at the criminal trial of this respondent disclosed that the lending institutions were advised of all the facts pertaining to and contained in the customers' applications for loans before funds were advanced or disbursed, and that at the request of the officers of the lending institutions who were lending the customers funds this defendant had the various customers submit a statement in writing to the following effect:

> "We, Joseph Witalis and Ann Witalis, in connection with our application for a loan of $1,500.00, under the provisions of Title I, F. H. A., certify that the proceeds of the loan will be used for the purpose of replastering the first floor kitchen, resurfacing the basement floor, repairing leaders and redecorating entire interior of premises at 250 Broad Street, Newark, New Jersey. Signed by Joseph Witalis and Ann Witalis, dated December 22nd, 1947."

That said statements were procured from the customers before said funds were disbursed by the said lending institutions.

However, the provisions of 12 U. S. C. 1731 (A) were such that technically unless the actual funds loaned were used by the applicants to make the repairs, the Statute was violated and such act became punishable as a crime.)

(I also wish to call the Court's attention to the statement at the bottom of page 5, note #4 of said Petition for Writ of Certiorari which states, "In the Cochran case, the facts of which are substantially the same as here * * * " has one important and fundamental difference which makes this case entirely different. In the *Cochran* case, Cochran was the defendant who signed the applications, who made and presented them and received the benefits therefrom. In our case, sub judice, Tieger was not the applicant, received none of the benefits, had no contract with the F.H.A. or lending institution and acted merely as a messenger or secretary in any office would act in completing forms at the direction of his employer.)

Reasons for Denying Petitioner's Petition for Writ of Certiorari and for Granting Respondent's Cross Petition for Writ

All seven counts of the Complaint filed by the plaintiff herein should have been stricken for the reason that the allegations thereof do not comprise a cause of action within the contemplation, intent, and/or purview of the False Claims Statute. Such key words and phrases that are contained in the False Claims Statute as e.g., "for payment or approval," "payment or approval of such claim," "false bills," "receipt," "voucher," "roll," "account," "claim, certificate, affidavit or deposition," "payment or allowance," "any amount of such money or other property less than that for which he received a certificate or took a receipt"

cannot be disregarded in arriving at the proper construction of the False Claims Statute, as applied to facts in case at Bar.

It would appear that the origin of this Statute can be traced to a situation that existed during the time the Civil War was being fought within the United States. At that time there were many persons who were not in the Military or Naval Forces of the United States, or in the Militia employed in the service of the United States who were doing business with the United States Government; selling it supplies of every nature and description, who when presenting vouchers for payment alleged therein in one form or another, an amount they claimed due from the government in excess of that for which the government was legally and rightfully indebted to them. It was to prevent this kind of fraud, cheating or swindling that Section 3, Chapter 67, 12 Statute 698, was originally enacted on March 2, 1863.

The Statute states, "Any person not in—etc. who shall make or cause to be made—etc." and deals with and intends to deal with only one person; that person may be any person, who, either himself, or through another, acting for him, makes or causes to be made * * * etc. a claim * * * etc." It is clear that this Statute intended to reach the "principal" in a transaction and the principal being the one who had a direct contractual obligation with the Government. Tieger was not such a principal. At most it can be said his office employees filled in the forms acting for the principals, who in our case, consisted of all the applicants enumerated in the Complaint filed in this cause.

It was thereafter that subsequent changes were made in some detail, but the essential element of the Statute was never changed and has not been changed until this date, and that essential element is that "there must be a claim existing from the government to the claimant" and "the defendant must be a claimant, or someone on behalf of the claimant when requesting the government to pay such

claim, falsifies the same to some extent, with the fraudulent intent that the government be cheated or defrauded out of any money or other public property used or to be used in the Military or Naval services."

The United States Supreme Court has reiterated over and over again in the cases hereinafter cited, that, in construing a Statute, construction not plainly dictated by the Legislative language should be avoided; that the fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the Statute; a legislative intention not expressed in some appropriate manner has no legal existence; in construing Statutes the question before the Court is not what did the Legislature actually intend but what intention has it expressed; legislative intent, if it can be ascertained from language employed, must control; legislative intent must not be conjectured nor presumed from something other than the Statute or something outside of the Statute which is at variance with the language thereof. The construction sought by the United States Government in this case does violence to the language expressed by Congress in its enactment of the False Claims Statute. A Statute ought not to be expounded by detached words or phrases but the whole act must be taken together and be given a fair interpretation, neither extending nor restricting it beyond the legitimate import of its language and its obvious policy and object, *Galyer* v. *Widler*, 51 U. S. 447 (10 Howard). Therefore, you can't detach such words or phrases from the False Claims Statute which are incorporated in the title, to this point; words and phrases like "payment or approval," "payment or approval of such claim," "any false bill," "receipt," "voucher," "roll," "account," just to mention a few, in arriving at a proper interpretation or construction of this Statute. Nor can the government detach the word "claim" and attempt to define it as it does in its brief without taking into consideration the other words and phrases contained in the Statute. Tak-

ing the *entire* context of this Statute into consideration, it can be gleaned that Congress intended by its use of the word "claim" that a demand by a creditor of the United States Government was definitely contemplated, and further that such creditor within the confines of this Statute *had to be one who performed work, labor or service for the government or who furnished materials or supplies to the government.*

It is further to be gleaned when considering the entire context and not detaching words as the government does in its brief, that *for one to be a claimant he must be a direct obligee of the government and the government cannot be a contingent obligor by way of contracts of suretyship, guarantee or indemnity.*

The United States Supreme Court has held that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the Act, and words used may be qualified by their surroundings and connection. *Red Bird* v. *U. S.*, 203 U. S. 76; *Carlson* v. *Landon*, 342 U. S. 524. This rule of statutory construction when applied to the facts in the case at bar destroys the position taken by the United States Government in that the word "claim" as used in the Statute must be considered in connection with the other words or phrases as contained in said Statute which denote a claim against the government on a direct contractual obligation that exists between the claimant and the government.

In a case where the United States Supreme Court was called upon to determine whether or not the Interstate Commerce Commission, under and by virtue of a statute involved therein, was justified in attempting to bring within its jurisdiction all "employees" of carriers, the Court ruled against the Interstate Commerce Commission and held that Congress intended only a specific class of "employees."

The rule of statutory construction that the United States Supreme Court in this case applied was, that it is improper in construing a Statute to take a few words from its context and with them thus isolated, attempt to determine their meaning. *U. S.* v. *American Trucking Association,* 310 U. S. 534.

In *Porto Rico* v. *Shell Co.,* 302 U. S. 253, the United States Supreme Court held that the meaning of the words used in a statute is to be arrived at not only by a consideration of the words themselves, but by considering as well the context, the purposes of the law, and the circumstances under which the words were employed. See also *U. S.* v. *Raynor,* 302 U. S. 540.

Cases construing the False Claims Statute in accordance with the foregoing are: *U. S.* v. *Cohn,* 270 U. S. 339. The Court said at page 345:

> "a claim upon or against the government relates solely to the payment or approval of claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant."

U. S. ex rel. Kessler v. *Mercur Corporation, et al.,* 13 Fed. Sup. 742-82 Fed. 2nd 178 on page 743 of 13 Fed. Sup., the Court stated:

> "This means a claim for money or property, 'to which a right is asserted against the government based upon the government's own liability to the claimant' * * *."

U. S., ex rel. Marcus, et al. v. *Hess, et al.,* 127 Fed. 2nd 233. The Court stated on page 237:

> "a claim against the United States means a right to demand money from the United States."

Hobbs v. *McLean,* 117 U. S. 567, the Court stated on page 575:

> "What is a claim against the United States is well understood. It is a right to demand money from the United States."

The term "claim," in its common acceptance, denotes a demand for money or property as of right. Accord, *Hobbs* v. *McLean,* 117 U. S. 567, 575; *Milliken* v. *Barrow,* 65 Fed. 888, 894; *United States* v. *Byron,* 223 Fed. 798, 800; *U. S., ex rel. Rodrigues* v. *Weekly Publication Inc., et al.,* 68 Fed. Supplement 766. There is no allegation that any such "claim" or demands were ever made upon the United States or any agency thereof by this respondent.

CONCLUSION

This defendant respectfully submits that no cause of action against him has been pleaded in any one of the seven counts of the Complaint filed herein, and that for the foregoing reasons this Petition for a Writ of Certiorari should be denied and this Cross Petition for a Writ of Certiorari should be granted.

SAMUEL VOLTAGGIO,
Attorney for Respondent.

October, 1956.